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No. 86-1174

In The
Supreme Court of the United States
October Term, 1986

DOUGLAS A. HOLMBERG,

Petitioner,

vs.

RODNEY C. MORRISETTE and MINTEX CORPORATION, a Minnesota corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. The District Court's Findings of Fact, Conclusions of Law	2
B. The Decision of the Court of Appeals	5
REASONS THAT THE WRIT SHOULD NOT BE GRANTED	6
A. The Decision Below Does Not Raise Questions of Exceptional Importance Which Should Be Settled By This Court	6
B. The Holmberg Decision Does Not Threaten To Create A Different Standard Of Review For Civil RICO vs. Criminal RICO	13
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Bank of America National Trust and Savings Association vs. Touche Ross, 782 F.2d 966 (11th Cir. 1986) 8, 9

Frankarf Distributing, Inc. vs. RMR Advertising, Inc., 632 F.Supp. 1198 (S.D.N.Y. 1986) 8

Ghouth vs. Conticommodity Services, Inc., 642 F.Supp. 1325 (N.D. Ill. 1986) 8

Illinois Department of Revenue vs. Phillips, 771 F.2d 312 (7th Cir. 1985) 6, 7

Morgan vs. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986) 7, 9, 13

Northern Trust Bank/O'Hare, N.A. vs. Inryco, Inc., 615 F.Supp. 828 (N.D. Ill. 1985) 10

R.A.G.S. Couture, Inc. vs. Hyatt, 774 F.2d 1350 (5th Cir. 1985) 6, 7

Sedima S.P.R.L. vs. Imrex Co., — U.S. —, 105 S. Ct. 3275 (1985) ..... 7, [illegible], 13

Superior Oil vs. Fulmer, 785 F.2d 252 (8th Cir. 1986) 10

United States vs. Teitler, 802 F.2d 606 (2nd Cir. 1986) 8, 9

United States vs. Tom, 787 F.2d 65 (2nd Cir. 1986) 6, 7, 13

United States vs. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) 7

STATUTES

18 U.S.C. §§ 1961-1968 2

18 U.S.C. § 1962(c) 6

18 U.S.C. § 3575 2

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 800 F.2d 205 and is reprinted in the Petition Appendix. The District Court's Findings of Facts, Conclusions of Law, and Order for Judgment and Memorandum is also included in the Petitioner's Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1986. The Respondents acknowledged that this Court has jurisdiction to hear the Writ.

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STATUTES INVOLVED

The Organized Crime Control Act of 1970, Title IX (Racketeer Influenced and Corrupt Organizations), 18 U.S.C. §§ 1961-1968, as amended (RICO), and 18 U.S.C. § 3575(e).

The relevant sections of these statutes are set forth in the Petitioner's Appendix.

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STATEMENT OF THE CASE

A. The District Court's Findings of Fact and Conclusions of Law

The District Court awarded treble damages under RICO and actual and common law punitive damages against the Respondents. The actual damages awarded were One Hundred Twenty Five Thousand and No/100 ($125,000.00) Dollars, and pursuant to RICO, would treble to Three Hundred Seventy Five Thousand and No/100 ($375,000.00) Dollars. The District Court also awarded attorney's fees to Petitioner pursuant to RICO. The District Court further concluded that in the event RICO damages were not upheld, common law punitive

damages in the amount of Two Hundred Fifty Thousand and No/100 ($250,000.00) Dollars should be awarded to the Petitioner.

Respondent Mintex Corporation is a Minnesota corporation which produces wall plaques. Respondent Rodney Morrisette at times relevant to this case was the President of Mintex, and the owner of fifty (50%) per cent of the stock. Trans World Services, Inc. (TWS) is a Minnesota corporation engaged in export trading. TWS would normally purchase goods and provide security by obtaining a letter of credit from investors. TWS would be the initial beneficiary of the letter of credit, and then transfer the letter of credit to Mintex to secure payment for production of the goods. If TWS did not pay for the goods, Mintex could use the letter of credit to obtain payment.

In September 1981, Mintex agreed to supply TWS with product which was destined for shipment to a Nigerian importer, G.N.A. Hamzer & Company. TWS secured the purchase with a series of letters of credit, including a One Hundred Twenty-five Thousand and No/100 ($125,000.00) Dollar letter of credit from the Petitioner, a Twenty-five Thousand and No/100 ($25,000.00) Dollar letter of credit from Gilbert Watson, and a Twenty-five Thousand and No/100 ($25,000.00) Dollar letter of credit from Peter DeJongh.

Mintex produced Sixty-five Thousand Two Hundred Thirty-two and No/100 ($65,232.00) Dollars worth of product and shipped it to Hamzer in Nigeria by December 1981. By May of 1982, Mintex produced an additional Two Hundred Sixty-four Thousand Twenty-one and No/100

($264,021.00) Dollars worth of product for Hamzer, which TWS stored in Illinois. Mintex was not paid for any of the product.

The letters of credit submitted by Mr. DeJongh and Mr. Watson required that Mintex supply the bank with an Ocean Bill of Lading in order to receive payment on the letters of credit. TWS shipped the Sixty-five Thousand Two Hundred Thirty-two and No/100 ($65,232.00) Dollars worth of goods to Hamzer by air rather than ocean, but Mintex actually had supplied Sixty-five Thousand Two Hundred Thirty-two and No/100 ($65,232.00) Dollars worth of goods to Nigeria for which it had not been paid. In June 1982, the Respondents requested and received payment on the DeJongh letter of credit and in October 1982 Respondents drew down on the Watson letter of credit. Neither Mr. DeJongh nor Mr. Watson made any claim that the Respondents acted improperly in drawing on the letters of credit, and the banks involved, concluded that even though the product had been shipped by air rather than sea, there had been substantial compliance with the terms of the letters of credit and allowed the Respondents to draw down on them.

With respect to Petitioner's letter of credit, the terms of the letter of credit required either in an Air or Ocean Bill of Lading. Payment on the letter of credit was predicated on shipment of the goods to Hamzer, and draw down on the letter of credit could not occur until after shipment. The District Court found that the Respondent submitted invoices to the Petitioner's bank indicating that One Hundred Ninety-three Thousand Nine Hundred Sixty-four and No/100 ($193,964.00) Dollars worth of plaques had been manufactured and shipped to Hamzer in October and November 1981. The District Court found that in fact, the

documents were false and misleading, since TWS had shipped only Sixty-five Thousand Two Hundred Thirty-two and No/100 ($65,232.00) Dollars worth of goods to Hamzer. The remainder of the goods were in a warehouse in Illinois. The District Court found that since Hamzer was a customer of TWS, and not Mintex, Hamzer did not owe the Respondents One Hundred Ninety-three Thousand Nine Hundred Sixty-four and No/100 ($193,964.00) Dollars.

In addition to collecting on the letters of credit, Mintex commenced a replevin action in Illinois on October 9, 1982 to recover the goods in the Illinois warehouse. In its Replevin Complaint, Mintex represented that it owned the goods in the warehouse.

The District Court concluded that the Respondents fraudulently altered the documents used to support its draw down on the Petitioner's letter of credit. The District Court further concluded that the pattern requirement of RICO was met due to the fact the Respondents fraudulently drew down on the DeJongh and Watson letters of credit by submitting an Air Bill of Lading instead of an Ocean Bill of Lading as was required by the letters of credit. The District Court further concluded that the Respondents had acted fraudulently by stating in its Illinois Replevin Action that it owned the goods in the Illinois warehouse.

B. The Decision of the Court of Appeals

On appeal, the Eighth Circuit Court of Appeals affirmed the District Court's Findings for Actual and Punitive Damages. The Eighth Circuit overturned the RICO portion of the District Court's Judgment on the

grounds that the Respondents' actions with respect to the DeJongh, Watson, and the replevin action did not constitute requisite pattern of racketeering activity required by 18 U.S.C. 1962(c). Accordingly, the Eighth Circuit reversed the District Court's Conclusions of Law on RICO and remanded the case to reset the common law punitive damages award.

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REASONS THAT THE WRIT SHOULD NOT BE GRANTED

A. The Decision Below Does Not Raise Questions of Exceptional Importance Which Should Be Settled By This Court

The Respondents acknowledge that the issue of what constitutes pattern within the context of RICO is an important issue which should be considered by this Court. The Respondents also acknowledge that different Circuits and different Districts within some of the Circuits, have differing interpretations of the pattern requirement. It is the position of the Respondents however that applying the RICO Statute to the facts of the instant case, the District Court's RICO Ruling is not proper under any of the various interpretations of the pattern requirement of RICO.

The Petitioner identifies four different tests used to satisfy the pattern requirement by various Courts. The first test requires only two related acts of mail or wire fraud to establish a RICO pattern. *United States vs. Tom,* 787 F.2d 65 (2nd Cir. 1986); *R.A.G.S. Couture, Inc. vs. Hyatt,* 774 F.2d 1350 (5th Cir. 1985); and *Illinois Department of Revenue vs. Phillips,* 771 F.2d 312 (7th Cir. 1985).

The *R.A.G.S.* case involved a Motion for Summary Judgment, and the Fifth Circuit simply ruled that at that stage of the proceedings, it could not say that the two alleged acts of mail fraud were not enough to satisfy the pattern requirement. The *U.S. vs. Tom* case involved a Motion to Dismiss an Indictment Prior to Trial, and the Second Circuit Court of Appeals simply held that since two acts of racketeering activity were alleged, and two acts may be enough to satisfy the pattern requirement, it would be improper to dismiss the indictment. The findings in the *Tom* case and the *R.A.G.S.* case would likely be upheld under any interpretation of the pattern requirement. In the *Illinois Department of Revenue* case, the Seventh Circuit held that the mere existence of several separate offenses of mail fraud were sufficient to constitute a pattern of racketeering activity, relying on its earlier findings in the case of *United States vs. Weatherspoon,* 581 F.2d 595 (7th Cir. 1978). The Seventh Circuit later held however in the case of *Morgan vs. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986) that to the degree that prior to *Sedima S.P.R.L. vs. Imrex Co., Inc.,* 105 S.Ct. 3275 (1985) the Seventh Circuit said that two predicate acts invariably constitute a pattern as it said in the *Weatherspoon* case, such statements are no longer valid (*Morgan* at page 975).

To the extent that the Petitioner interprets the findings of *Tom, R.A.G.S.* and *Illinois Department of Revenue* to hold that the mere existence of two related acts of mail or wire fraud to establish a RICO pattern, the rulings in these cases are contrary to *Sedima S.P.R.L. vs. Imrex Co., Inc.,* 105 S.Ct. 3275 (1985). As footnote No. 14 in *Sedima* states, continuity plus relationship combines to

produce a pattern. The mere existence of a relationship alone is not sufficient to produce a pattern.

The second test identified by the Petitioner is the test applied by the Courts in the *United States vs. Teitler,* 802 F.2d 606 (2nd Cir. 1986) and *Bank of America vs. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986), which require a showing of more than one racketeering act and the threat of a continuing activity. Under this test, the continuity factor is paramount. As the Court in *Ghouth vs. Conticommodity Services, Inc.,* 642 F.Supp. 1325 (N.D. Ill. 1986) indicates, continuity presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity. As the Court in *Ghouth* further states, two or more mailings which further just one criminal end might satisfy the "relationship" test, but they do not by themselves evidence continuity or a threat of continuing activity.

The Eighth Circuit Court of Appeals in the instant case concluded that the Respondents' actions comprised one scheme to draw down three letters of credit securing Mintex's transactions with TWS with respect to goods specifically produced by Mintex for shipment to Nigeria. As the Court states, the Respondents' actions were a misguided attempt to obtain payment for goods which they had produced, yet over which they had lost control. The facts of the instant case are more akin to the facts of *Frankarf Distributing, Inc. vs. RMR Advertising, Inc.,* 632 F.Supp. 1198 (S.P.N.Y. 1986) where there were multiple mailings, but they were done as part of one fraud involving one contractual relationship. The Court in *Frankarf* ruled that since there was a distinct and easily

defined beginning and end of the transactions, and there was no threat of continuing activity, the pattern requirement was not met.

The Eighth Circuit in this case concluded that there was no evidence that Mintex or Morrisette had engaged in like activities in the past or that they were engaged in other criminal activities. Following the continuity test relied on by the Courts in *United States vs. Teitler,* 802 F.2d 606 (2nd Cir. 1986) and *Bank of America vs. Touche Ross & Co.,* 782 F.2d 1966 (11th Cir. 1986), the Eighth Circuit was right that there was no continuity, and therefore was right in reversing the judgment on the RICO claim.

A third test identified by the Petitioner is that the predicate acts must be ongoing over an identified period of time so that they can therefore be viewed as constituting separate transactions. *Morgan vs. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986). In *Morgan,* the Defendants formed a series of corporations and made a series of false representations to the Plaintiffs to induce the Plaintiffs to invest in the corporations and to guaranty loans of the corporations. The allegation in *Morgan* was that the bank worked with the owners of a drug store in defaulting on a loan, foreclosing on the loan, selling the assets of the foreclosed drug store to a separate drug store owned by the same parties, all guaranteed by the Plaintiffs. As the Court concluded, the same scenario was repeated seventeen (17) months later when the second drug store defaulted, the bank foreclosed, the owners of the corporation formed a new corporation and bought the assets from the foreclosure sale, exposing the Plaintiffs to a deficiency

judgment. These were clearly two distinct transactions with their being a beginning to the first transaction, a conclusion, a seventeen (17) month lull, the beginning of a second transaction, and the end of the second transaction.

There was no separate transactions in the instant case. There was one sale of goods to TWS by Mintex for shipment to Nigeria which were secured by three different letters of credit. The Respondents produced one set of goods on one contract, and as the Court of Appeals stated, the Respondents' actions were a misguided attempt to obtain payment. It is interesting to note that in ruling, the Eighth Circuit relied on the language of a Seventh Circuit District Court in *Northern Trust Bank/O'Hare, N.A. vs. Inryco, Inc.*, 615 F.Supp. 828 (N.D. Ill. 1985) and stating, "It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern' of racketeering activity." (At 931).

The fourth test identified by the Petitioner is a test used by the Eighth Circuit in the case of *Superior Oil vs. Fulmer*, 785 F.2d 252 (8th Cir. 1986). The Eighth Circuit did specifically rely on the *Superior Oil* case in reaching its decision in the instant case.

It is the position of the Respondents that no matter what test is applied, the Eighth Circuit was correct in overturning the RICO count of the judgment. Under all of the tests applied, there must be a continuity plus a relationship in order to produce a pattern. The Eighth Circuit simply ruled that there was no evidence that Mintex or Morrisette had engaged in like activities in the past or that they were engaged in other criminal activ-

ities. In other words, there was no continuity, and thus no pattern. Such a determination was not in conflict with the wording of the statute, the decisions of the other Circuits, or the decision of this Court in the case of *Sedima S.P.R.L. vs. Imrex Co., Inc.,* 105 S.Ct. 3275 (1985).

The Petitioner argues that Respondents' activities in the instant case amount to a pattern under *Sedima* by quoting the following statement from *Sedima:*

> "Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

Sedima, 105 S.Ct. at 3285 n.14.

The Petitioner argues that the Respondents' activities in providing false and misleading documentation in an effort to collect on the Petitioner's letter of credit were part of the same pattern as the Respondents' activities in drawing down on the DeJongh and Watson's letters of credit and filing the replevin action in Illinois. While it is true that all of the actions were an attempt to collect money, it was only in the Petitioner's case that the Court of Appeals determined that false or misleading documents were presented. In the case of DeJongh and Watson letters of credit, the Respondents simply presented documentation that more than Twenty-five Thousand and No/100 ($25,000.00) Dollars worth of goods had been shipped to Nigeria and payment was not received. In fact Sixty-five Thousand and No/100 ($65,000.00) Dollars had been shipped to Nigeria of which payment was due. The only problems on the DeJongh and Watson letters of credit

was the Bill of Lading supplied to the banks by the Respondents was in an Air Bill of Lading as opposed to a Ocean Bill of Lading, as required by the letters of credit. There was no evidence that the Respondents in any way altered or presented the Bill of Ladings in a misleading manner. There was no evidence that any of the banks involved with Mr. DeJongh and Mr. Watson determined that a fraud had been committed against them, or that they had been damaged in any way by the fact that an Air Bill of Lading was presented as opposed to an Ocean Bill of Lading. At best a determination could be made that the banks wrongfully allowed the Respondents to draw down on the letters of credit when all of the technical requirements of the letters of credit had not been met, but the acts of the Respondents were not the same or similar to the acts involved in the Holmberg letter of credit.

With respect to the replevin action in Illinois, it is undisputed that there was a large quantity of goods which the Respondents had produced in the warehouse for which it had not been paid. It is difficult to determine how any fraud was committed upon the Court in Illinois, but if it was, its only similarity to the acts involving the Petitioner was that it was an attempt to get paid for goods. The results, the participants, the victims, and the methods of commission was not related in any manner.

As the Respondents indicated earlier in this Brief, it is not disputed that certain discrepancies exist between the various Circuits in defining the pattern requirement of RICO. It is the position of the Respondents however that under any interpretation of the pattern requirement of RICO, the activities of the Respondents in the instant

case do not meet the continuity plus relationship combination necessary to form a pattern.

B. The Holmberg Decision Does Not Threaten To Create A Different Standard Of Review For Civil RICO vs. Criminal RICO

The Petitioner argues that by requiring criminal acts to be related in order to invoke RICO the Eighth Circuit in the instant case created a different standard of review for Civil RICO cases. If that is true, the Supreme Court has already done that in the *Sedima* case by holding that pattern requires continuity plus relationship. All of the cases cited by the Petitioner in support of his contention that the Eighth Circuit set up a separate standard of review occurred prior to *Sedima,* with the exception of the case of *United States vs. Tom,* 787 F.2d 65 (2nd Cir. 1986). As the Court stated in *Morgan vs. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986), to the extent Courts held that two predicate acts invariably constitute a pattern prior to *Sedima,* such was not the case after *Sedima.* With respect to the *United States vs. Tom,* supra case, the Court did not conclude that two acts did constitute a pattern, but rather that since the ruling was on a Motion to Dismiss an Indictment, two such acts may constitute a pattern.

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CONCLUSION

While there are various interpretations of the pattern requirement of RICO used in the various Circuit Courts, the ruling of the Eighth Circuit Court of Appeals on this case was valid under any interpretation of pattern. For that reason, the instant case is not an appropriate case for Certiorari to be granted.

Respectfully submitted,

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